"MIND"ING YOUR BUSINESS: ESTATE PLANNING DOCUMENTS AND THE LEVELS OF CAPACITY REQUIRED FOR EXECUTION

by Georgia Akers[*]

In a perfect world, a client visits their attorney and plans for contingencies that may happen as aging takes place. The attorney will draft a group of documents that should cover medical matters as well as financial concerns regarding pre-death and post-death issues.

Documents such as powers of attorney for health care and durable powers of attorney are the most common documents utilized in pre-death estate planning. Post-death estate planning includes wills and trusts.

Clients that execute these documents with the assistance of a probate attorney ensure that their life can continue as they would want even if dementia affects them at a later date. These documents place the management of their

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body and estate in their control as opposed to a court-controlled management program in the form of a guardianship.

But this is not a perfect world, and many people either delay planning or refuse to face the inevitable. Once a loved one begins to have memory loss, the family assumes that it is too late to plan, and they will be faced with expensive and court-supervised guardianship.

If a person is in the early stages of dementia, estate planning may still be possible depending upon the type of dementia a person has and what type of documents are being considered for signing.

This paper will explore the various documents used in pre-death and post-death estate planning and what level of capacity is necessary to execute such documents.

I. RECOGNIZING COGNITIVE LIMITATIONS IN CLIENTS

What is a cognitive limitation? This is a relatively vague term that varies in meaning depending on what context and to whom it is applied.[1] In the context of persons with dementia, cognitive limitations are often a piece of a larger competency puzzle.[2]

Dementia is defined as a loss of mental ability, caused by physical changes in the brain, severe enough to interfere with normal activities of daily life.[3] Dementia is a clinical state characterized by loss of function in multiple cognitive domains.[4] The loss of functions may show up as some form of memory impairment and at least one of the following: aphasia (deterioration of language function), apraxia ("impaired ability to execute motor activities despite intact motor" function), agnosia ("failure to recognize or identify objects despite intact" motor function), or disturbances in executive functioning ("the ability to think abstractly and to plan, initiate, sequence, monitor, and stop complex behavior").[5] Dementia patients may exhibit tangible symptoms such as poor judgment and insight.[6] In addition, individuals may make unrealistic assessments of their abilities, become disoriented, neglect hygiene, have sleep disturbances, become violent, and exhibit undue familiarity with strangers.[7] Dementia may be progressive, static, or remitting, and the course depends on the underlying etiology.[8]

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1. *See generally*, John Rochford, *Definitions of "Cognitive Disability,"* WordPress Blog, (Sept. 29, 2010 6:04 PM), http://clearhelper.wordpress.com/definitions-of-cognitive-disability/.

2. Evelyn M. Tannenbaum, *To Be or to Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery*, 42 IND. L. REV. 675, 676–78 (2009).

3. AMERICAN PSYCHIATRIC ASSOCIATION: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 147–48 (4th ed., text revision 2000).

4. *Id.* at 148.

5. *Id.* at 148–50.

6. *Id.* at 150.

7. *Id.* at 152.

8. *Id.*

Dementia is often the basis—and overriding reason—that a person is alleged to be incapacitated. The person's incapacity depends on the severity of the cognitive impairment and the available social supports.[9]

II. TOOLS TO EVALUATE LIMITED COGNITION AND CAPACITY

How does the doctor decide that the person with dementia has deteriorated to a state of incapacity? What are the criteria? Where does the doctor get that information? What are the tools used to fit the dementia patient into the incapacity criteria? There are numerous tools used by professionals in all areas to assist in determining the level of cognitive functioning or limitations in individuals who have questionable capacity.[10] The *Judge's Book* describes numerous tools used by professionals in all areas: cognition, everyday functioning, neuropsychology, and functional/capacity.[11] Surprisingly, there are many tools that can be utilized by non-medical professionals.

Some of the more commonly used tools are: the Paradise-2 Protocol; the Assessment for Risk of Living Alone; the Mini-Mental State Examination; and the CLOX I and II.[12]

There are other assessment tools that can specifically target a particular area such as depression, independent living, and financial capacity.[13]

III. LEGAL DOCUMENTATION COMMONLY USED BY CAREGIVERS

"While it's important for everyone to plan for the future, legal plans are especially vital for the person with dementia."[14] Because dementia affects a person's ability to make sound personal and financial choices, it is helpful to have the proper legal documents executed while the person still has the requisite legal capacity.[15] Having these documents in place helps to ensure that the person's wishes regarding future medical and financial decisions will be carried out by a person that they trust.[16] Further, by having these documents

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9. *Id.*

10. AM. BAR ASS'N COMM'N ON LAW & AGING, AM. PSYCHOLOGICAL ASS'N, NAT'L COLL. OF PROBATE JUDGES, JUDICIAL DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS 48–49, 53–54 (2006) [hereinafter JUDGE'S BOOK].

11. *Id.*

12. Bennet Blum, M.D., *Paradise—2 Protocol*, http://www.bennettblummd.com/id15.html (last visited Oct. 5, 2010); ANN BOSSEN, ET AL., SIGNS TO WATCH FOR IN PEOPLE WHO LIVE ALONE OR WHO ARE AT HIGH RISK (2004); Marshall F. Folstein, *The Mini-Mental State Examination*, http://www.stanford.edu/~ashford/mmsgenealogy/mmsereview.pdf; Donald R. Royall, et al., *CLOX: an Executive Clock Drawing Task*, 64 NEUROL. NEUROSURG. PSYCHIATRY 588, 588–94 (1998), http://ncbi.nlm.nih.gov/pmc/articles/mc2170069/pdf/v064p00588.pdf.

13. *See* JUDGE'S BOOK, *supra* note 10, at 8–13.

14. ALZHEIMER'S ASS'N, LEGAL PLANS: ASSISTING THE PERSON WITH DEMENTIA IN PLANNING FOR THE FUTURE 2 (2005).

15. *Id.*

16. Jerry M. Scroggins & Amanda M. Gyeszly, *Don't Leave Your Family Guessing: The Need for Wills and Powers of Attorney*, HOUS. LAWYER, May–June 2006, at 14, 18.

prepared, it will save family members the stress of having to guess as to what their loved ones would have wanted or who they would have wanted to take care of their affairs.[17]

There are two types of legal documents for persons with dementia or for any person wanting to prepare for the future.[18] The first type, consisting of the Medical Power of Attorney and the Living Will/Advance Directive, are used in planning for future healthcare decisions.[19] The second type, consisting of the statutory Durable Power of Attorney and Living Trusts, are tools that prepare for the future management of a person's finances.[20] Additionally, two other documents, a Declaration of Appointment of Guardian and Wills, are the most commonly used instruments in estate planning.[21] The majority of these documents are pre-death documents that can assure that the person can live with little or no court supervision.

A. Documents Pertaining to Healthcare

1. Medical Power of Attorney

The Medical Power of Attorney (MPA), previously called a "Durable Power of Attorney for Health Care," is a statutory form authorized under chapter 166 of the Texas Health and Safety Code.[22] The person executing the MPA is known as the "principal."[23] Through the MPA, the principal is allowed to designate a qualified "agent" who is given authority to "make any healthcare decision on the principal's behalf," should the principal become incompetent.[24] The agent is authorized to make healthcare decisions for the principal such as selecting "[d]octors and other health care providers[,] [k]inds of treatments [and] [c]are facilities."[25] However, the MPA is a "springing document that" only becomes effective in allowing the agent to make decisions upon the physician's written certification declaring the principal incompetent.[26]

Section 166.164 of the Texas Health and Safety Code provides a form as a guideline of what the MPA should contain.[27] The MPA should state both the principal's and the agent's names, along with the agent's contact information.[28] Further, the MPA should contain the names and information of any alternate

17. *Id.* at 19.
18. *See infra* Parts III.A.1–2.
19. *See infra* Part III.A.2.
20. *See infra* Part V.
21. *See infra* Part V.
22. Scroggins & Gyeszly, *supra* note 16, at 15; Thomas W. Mayo, *Annual Survey of Texas Law Article: Health Care Law*, 53 SMU L. REV. 1101, 1111 (2000).
23. TEX. HEALTH & SAFETY CODE ANN. § 166.151(4) (Vernon Supp. 2009).
24. *Id.* § 166.152(a).
25. ALZHEIMER'S ASS'N, *supra* note 14, at 9.
26. Scroggins, *supra* note 16, at 15; *see also* § 166.152(b).
27. Scroggins & Gyeszly, *supra* note 16, at 15; *see also* § 166.164.
28. § 166.164.

agents that the principal would like to appoint should the first-named agent become unable or unwilling to act.[29] The MPA should also contain any limitations placed on the decision-making authority given to the agent and, if applicable, should also state the duration of the MPA.[30] In addition, the form should state the location of the original MPA and should state any institutions or medical personnel that have received signed copies of the original form.[31] Also, in order for the MPA to be valid, the principal must have read and understood the contents of the disclosure form provided in section 166.164 of the Texas Health and Safety Code.[32] The disclosure form "gives a 'Plain English' description of the MPA."[33] A statement to this effect should be included in the MPA.[34]

Two witnesses must be present for the signing of the MPA by the principal.[35] The two witnesses—one of whom must be disinterested—are required to sign the MPA.[36] In order for an individual to qualify as a disinterested witness, the person must not be designated as the agent in the MPA; be related to the principal; have an interest in the principal's estate; be the licensed attending physician or employed by the healthcare center that is providing direct care to the principal; or be a creditor against the principal's estate upon the principal's death.[37] The principal may revoke the MPA at any time, regardless of the principal's competency.[38] Further, the principal may revoke the MPA either orally or in writing by either executing a new MPA or notifying the agent or healthcare provider.[39] The MPA is considered void upon divorce in situations in which the agent is the spouse of the principal, unless otherwise directed.[40]

In the past, Texas probate courts only had jurisdiction over disputes involving powers of attorneys if the dispute was related to a guardianship or estate in which the court was already involved.[41] As of 2009, the Texas legislature changed the Texas Probate Code to give direct jurisdiction to probate courts over disputes involving powers of attorneys, regardless of any pending suits.[42]

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29. *Id.*
30. Scroggins & Gyeszly, *supra* note 16, at 15.
31. § 166.164.
32. *Id.*
33. Scroggins & Gyeszly, *supra* note 16, at 15.
34. § 166.162.
35. *Id.* § 166.154(a).
36. *Id.*
37. *Id.* § 166.003(2)(A)–(G).
38. *Id.* § 166.155(a)(1).
39. *Id.* § 166.155(a)(1)–(2).
40. *Id.* § 166.155(a)(3).
41. Glenn M. Karisch, *Texas Probate, Guardianship and Trust Legislation*, 48 THE ADVOC. 15, 18 (2009).
42. *Id.*; *see also* TEX. PROB. CODE ANN. § 4G (Vernon Supp. 2009).

The authority given to the agent under an MPA is limited. While the MPA allows the agent to act on behalf of the principal, the agent's authority is restricted to making only healthcare decisions.[43] The appellee in *Texas City View Care Center v. Fryer* signed an MPA appointing her daughter as the agent.[44] Upon being appointed as the agent, the daughter signed a separate document on her mother's behalf, which was an arbitration agreement.[45] Later, in a medical malpractice suit against the hospital, the hospital tried to enforce the arbitration agreement against the principal's family.[46] The hospital argued that the daughter, by the authority given to her in the MPA, had signed the agreement, thus making the agreement binding.[47]

However, relying on the text of the MPA, the court disagreed.[48] First, the court found "no evidence that the medical power of attorney ever became effective."[49] The MPA stated that the agent would have authority only upon the certification of a doctor that the principal was incompetent to make decisions related to the principal's healthcare.[50] Because there was no evidence of incompetency or certification by a doctor, the court found that the MPA never took effect.[51] Further, the court went on to state that even if the MPA had taken effect, the arbitration agreement would not be binding because the MPA was only intended to confer authority to the agent to make healthcare decisions.[52] It did not give the agent authority to make legal decisions on the principal's behalf.[53] The court concluded that the arbitration agreement was not binding.[54] Therefore, it is important that the MPA be executed and followed procedurally in order to be valid.[55] Care must also be given not to exceed the authority of the MPA; the agent is to only make healthcare decisions.[56]

2. Directive to Physician (Living Will)

Another document related to healthcare is a Directive to Physicians, also known as a "living will." A living will is an "instruction . . . to administer, withhold, or withdraw life-sustaining treatment in the event of a terminal or

43. Tex. City View Care Ctr. v. Fryer, 227 S.W.3d 345, 352 (Tex. App.—Fort Worth 2005, pet. dism'd).
44. *Id.* at 348.
45. *Id.*
46. *Id.*
47. *Id.* at 351.
48. *Id.* at 352.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 353.
55. *See* TEX. HEALTH & SAFETY CODE ANN. § 166.152 (Vernon 2009).
56. *See id.*

irreversible condition."[57] A person with a terminal condition is someone who is expected to die within six months.[58] An irreversible condition is defined as an untreatable condition in which the person cannot live without the assistance of life support and is unable to care for himself.[59] Having this directive ensures that the incapacitated person's "wishes regarding end-of-life care, medication, and resuscitation are carried out," and "help[s] to avoid unnecessary, intrusive, and costly medical treatment," when it is no longer wanted.[60]

A Directive to Physician can be in either oral or written form.[61] A declarant should sign a written directive in the presence of two witnesses, one of which must be a disinterested witness (following same requirements as those discussed above for the MPA).[62] Another option is for the declarant to sign the written directive in front of a notary.[63] The declarant's physician should be notified of the directive so that it can be made part of the declarant's medical record.[64] If the directive is created orally, the declarant must create it in the presence of the their physician and two witnesses, one of whom must be disinterested.[65] The declarant's directions should be recorded in their medical record by the doctor, along with the name of the witnesses.[66]

Like the creation of the directive, the revocation of the directive can be in either oral or written form.[67] However, the revocation is not effective until the declarant has notified the physician that the directive has been revoked.[68] Further, the code protects individuals from civil or criminal liability for actions contrary to the revocation of a directive *only if* the individuals were not aware of the revocation.[69] The directive may be revoked at anytime, regardless of the competency of the declarant.[70]

Scholars criticize Advanced Directives on three grounds.[71] First, few people actually take the time to create an Advance Directive, possibly because people "would rather leave their fates in the hands of their families and physicians."[72] Second, the Advance Directive provides little information and is

57. *Id.* § 166.031(1).
58. *Id.* § 166.033.
59. *Id.* § 166.002.
60. Morgan Morrison, *Advance Medical Directives Ensuring Your End-of-Life Wishes are Known and Followed*, 68 TEX. B.J. 460, 460–61 (2005).
61. §§ 166.033–34.
62. *Id.* § 166.032(b).
63. *Id.* § 166.032(b-1).
64. *Id.* § 166.032(d).
65. *Id.* § 166.034(b).
66. *Id.* § 166.034(c).
67. *Id.* §§ 166.042(a)(2)–(3).
68. *Id.* §§ 166.042(b)–(c).
69. *Id.* § 166.042(d).
70. *Id.* § 166.042(a).
71. Rebecca Dresser, *Precommitment: A Misguided Strategy for Securing Death with Dignity*, 81 TEX. L. REV. 1823, 1829–37 (2003).
72. *Id.* at 1830.

often unclear.[73] Medical situations are rarely clear-cut, and the directive may not provide directions for every possible situation.[74] Therefore, families and physicians are often confused about what the principal would have wanted.[75] The final criticism is that the people executing the directive often do not fully comprehend the decisions they are making.[76] Because people cannot possibly plan for every medical scenario, they are often unable to perceive the advantages and disadvantages of different healthcare options.[77] One of the biggest areas of concern has been whether nutrition and hydration should be withdrawn along with other life sustaining treatment.[78] The principals and their doctors must discuss this issue to make an informed choice on the directive.[79]

The United States Supreme Court has found that competent individuals have the right to refuse medical treatment if they so wish.[80] However, the Court has also found that states have an interest in protecting life and can refuse to terminate life-support when the person has become incapacitated and has not previously made his wishes known regarding end of life treatment.[81] In *Cruzan v. Director of Missouri Department of Health*, a young woman was involved in a serious automobile accident, which resulted in her being in a persistent vegetative state.[82] Because chances of her recovering were slim, her parents sought to remove all artificial life-supports, which would undoubtedly result in her death.[83] She had no living will, and the only evidence that she wished to remove life-support was from a conversation she once had with her roommate.[84]

Because of the state's interest in the preservation of life, Missouri's law required "that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence."[85] The Supreme Court of Missouri held that the testimony of the roommate did not establish "clear and convincing proof" that Cruzan would want the life-support removed.[86] On appeal, the question brought before the United States Supreme Court was whether the state's requirement of clear and convincing evidence was unconstitutional.[87]

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73. *Id.* at 1830–31.
74. *Id.*
75. *Id.*
76. *Id.* at 1833.
77. *Id.*
78. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 266 (1990).
79. Dresser, *supra* note 71, at 1833.
80. *Cruzan*, 497 U.S. at 281 (1990).
81. *Id.*
82. *Id.* at 266.
83. *Id.* at 267–68.
84. *Id.* at 268.
85. *Id.* at 280.
86. *Id.* at 285.
87. *Id.* at 280.

The Court found that the interest at stake was substantial; therefore, the State had the right to require a heightened evidentiary standard.[88] The basis of the Court's reasoning was that "[n]ot all incompetent patients will have loved ones available to serve as surrogate decisionmakers," and even the patients that do have surrogate decision-makers may have family members who are not concerned with the patient's best interest.[89] Because of these "potential abuses," the state's heightened evidentiary requirements were constitutional based on its interest in protecting the life of the incompetent individual.[90]

Texas has established its own procedures for handling similar situations.[91] In a situation in which the incompetent individual has not created a living will prior to incompetency—but the person has an agent appointed under an MPA or has a legal guardian—the agent or guardian and the physician may make the "decision to withhold or withdraw life-sustaining treatment from the patient."[92] If there is not an agent or guardian, the physician—and either a spouse, child, parent, or next of kin—may make the decision regarding life-sustaining treatment.[93] However, in either case, the decision should be in line with what the patient would have wanted.[94] The surrogate decision maker must not make the decision based on the surrogate's wishes.[95]

3. Futile Case Law

A more recent—and perhaps more controversial—issue that has arisen in relation to end of life care is related to a subsection of the Texas Advance Directives Act, "commonly referred to as the 'Futile Care Law.'"[96] The Futile Care Law allows a doctor to refuse to continue life-sustaining treatment to patients whose situation the doctor deems medically futile.[97] This situation is also referred to as "reverse right-to-die."[98] Section 166.046 of the Texas Health and Safety Code sets forth the requirements that healthcare facilities must follow before refusing to continue life-support.[99] To be free from liability, the healthcare facility must follow the statutory process, which "includes a mandatory ethics consultation, a reasonable attempt to transfer the patient to another provider, and the continuation of the life-sustaining procedures for a minimum of ten days after the ethics committee provides a written explanation

88. *Id.* at 283.
89. *Id.* at 281.
90. *Id.*
91. TEX. HEALTH & SAFETY CODE ANN. § 166.039 (Vernon Supp. 2009).
92. *Id.* § 166.039(a).
93. *Id.* § 166.039(b)(1)–(4).
94. *Id.* § 166.039(c).
95. *Id.*
96. John M. Zerwas, Jr., *Medical Futility in Texas: Handling "Reverse Right-to-Die" Obstacles Without Constitutional Violation*, 43 TULSA L. REV. 169, 170 (2007).
97. Mayo, *supra* note 22, at 1109.
98. *Id.*
99. TEX. HEALTH & SAFETY CODE ANN. § 166.046 (Vernon Supp. 2009).

of its review process to the patient's surrogate."[100] After the expiration of ten days, the facility no longer has an obligation to provide life-sustaining treatment.[101] However, if this statutory procedure is not followed, the hospital must continue to provide life-support until the patient can be transferred to another facility.[102]

Texas has been recognized as "ground-zero for this futile-care movement."[103] A few well-publicized cases from Houston brought light to this issue in 2005.[104] One case involved an infant, named Sun, who had been diagnosed with "thanatophoric dysplasia," which required the infant to be put on a ventilator.[105] Following statutory procedures, the physician and ethics committee determined that life-support should not be continued.[106] The mother disagreed.[107] The trial court ruled that the life-support should be removed (although the case was later overturned by the appeals court on different grounds).[108] In addition to this case, there have been several other cases in which the court has upheld the hospital's decision to discontinue life-support.[109]

The Futile Care Act (Act) was brought to the public's attention through these cases. The Act has been heavily criticized because it only requires a subjective determination of futility by the doctors and does not provide a standard of care by which the doctors and the review committee must abide.[110] Further, the Act has been criticized on the grounds that it defeats its own purpose, which is to allow people to make their own choices regarding medical treatment.[111] Finally, critics argue that the Act is unconstitutional under the Fourteenth Amendment because: (1) it denies the patient of the right to life, (2) it is procedurally unfair because it does not provide adequate notice, and (3) it does not provide the patient an opportunity for the case to be heard by a neutral decision-maker.[112] Because of these arguments—and other claims of the Act's unconstitutionality—it will be interesting to see how this area of law develops in Texas and other states with similar legislation in the future.

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100. Mayo, *supra* note 22, at 1110.
101. *Id.*
102. *Id.* at 1111.
103. Zerwas, *supra* note 96, at 182.
104. *Id.*
105. Hudson v. Tex. Children's Hosp., 177 S.W.3d 232, 233 (Tex. App.—Houston [1st Dist.] 2005, no pet.).
106. *Id.*
107. *Id.*
108. *Id.* at 235, 238.
109. *See* Zerwas, *supra* note 96, at 179–82; *see also* Nora O'Callaghan, *Dying for Due Process: The Unconstitutional Medical Futility Provision of the Texas Advance Directives Act*, 60 BAYLOR L. REV. 527, 550–54 (2008).
110. O' Callaghan, *supra* note 109, at 539.
111. *Id.* at 538.
112. *Id.* at 584.

4. Capacity for Medical Power of Attorney and Directive to Physicians

As with all legal documents, the principal must be competent at the time the document is executed.[113] Capacity to make healthcare decisions is defined as having "the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision."[114] This type of capacity is often referred to as "decisional capacity."[115] Decisional capacity requires that the client have the ability to "understand the issue or question . . . and the consequences of that decision."[116] In relation to the other levels of capacity, testamentary and contractual, decisional capacity would be the middle ground.[117]

There is no Texas case law that provides a definition of decisional capacity. Illinois appears to have the most case law surrounding the topic of decisional capacity.[118] The Supreme Court of Illinois has defined decisional capacity as "the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment or forgoing life-sustaining treatment and the ability to reach and communicate an informed decision in the matter as determined by the attending physician."[119] This definition appears to be similar to the language set forth in section 166.002(4) of the Texas Health and Safety Code.[120] The only additional information the court stated is that a person is presumed to have decisional capacity until a physician makes a contrary determination.[121] However, this was the extent of the Illinois court's discussion on decisional capacity.[122]

IV. DOCUMENTS PERTAINING TO FINANCES

A. Statutory Durable Power of Attorney

The statutory Durable Power of Attorney (DPA), enacted under sections 481–506 of the Texas Probate Code, was created "to avoid the potential termination of a power of attorney when the principal becomes incapacitated."[123] While the MPA appoints an agent to handle the incapacitated

113. Kathleen Whitehead & Lauren Phillips, Advanced Guardianship Course Presented in Dallas: Texas Legal Standards Related to Mental Capacity in Guardianship Proceedings 11 (March 7, 2008).

114. TEX. HEALTH & SAFETY CODE ANN. § 166.002(4) (Vernon 2010).

115. *See* Dresser, *supra* note 71, at 1836.

116. Michael Kirtland, *Dealing With Mental Capacity Issues in Estate Planning*, 30 EST. PLAN. 192, 193 (2003).

117. *Id.*

118. *See infra* Part III.A.4.

119. Collins v. Lake Forest Hosp., 213 Ill. 2d 234, 239 (2004).

120. *See* TEX. HEALTH & SAFETY CODE ANN. § 166.002(4) (Vernon 2010).

121. *Collins*, 213 Ill. 2d at 239.

122. *Id.*

123. Whitehead & Phillips, *supra* note 113, at 10.

person's medical affairs, the DPA gives the agent authority to handle the incapacitated person's income and assets.[124]

Another difference between the MPA and the DPA is that with the DPA, the agent's authority to make decisions on the principal's behalf becomes effective at the execution of the document.[125] However, the principal can create a springing DPA, which makes the DPA "effective only upon the principal's subsequent disability or incapacity."[126] Since the determination of incapacity can be very subjective, it is recommended that the DPA "specify very clearly the circumstances under which the agent's authority becomes effective" to prevent any future disputes and complications.[127]

The requirements for the construction of the DPA are set forth in section 482 of the Texas Probate Code; a DPA is a written document that:

> (1) designates another person as attorney in fact or agent; (2) is signed by an adult principal; (3) contains the words "This power of attorney is not affected by subsequent disability . . . of the principal" or "This power of attorney becomes effective on the disability . . . of the principal" or similar words . . . ; and (4) is acknowledged by the principal before an officer authorized to take acknowledgements to deeds of conveyance and to administer oaths under the laws of this state or any other state.[128]

Further, the document allows the principal to withhold certain powers from the agent and also allows the principal to leave special instructions as to how the principal wants the agent to handle their financial affairs.[129] Special instructions, however, should be clearly set out because the court will strictly construe the instructions, not allowing the principal to exercise a power that has not been specifically given to them.[130] Because the context of the DPA will be strictly construed, it is important that if the principal appoints two agents to serve "conjunctively and equally," it creates a "joint agency," meaning that any actions taken must be consented to by *both* of the appointed agents.[131]

In *Musquiz v. Marroquin*, a mother signed a DPA in which she appointed both her son and daughter as attorneys-in-fact.[132] Shortly after, the daughter—without the son's consent—made costly improvements to their mother's home and eventually deeded the mother's home to herself and her husband.[133] In the

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124. ALZHEIMER'S ASSOCIATION, *supra* note 14, at 8.

125. *See* TEX. PROB. CODE ANN. § 482(3) (Vernon Supp. 2009).

126. Scroggins & Gyeszly, *supra* note 16, at 16.

127. *Id.*

128. Hardy v. Robinson, 170 S.W.3d 777, 780 (Tex. App.—Waco, 2005, no pet.) (citing TEX. PROB. CODE ANN. § 482 (Vernon 2003)).

129. TEX. PROB. CODE ANN. § 490 (Vernon Supp. 2009).

130. *Hardy*, 170 S.W.3d at 781.

131. Musquiz v. Marroquin, 124 S.W.3d 906, 911–12 (Tex. App.—Corpus Christi 2004, pet. denied).

132. *Id.* at 911.

133. *Id.* at 909.

son's suit against the daughter, the appellate court affirmed the trial court's finding that the power of attorney created a joint agency.[134] The court reasoned that, "If a principal invests two or more individuals with authority to represent it . . . it is ordinarily presumed that such authority was thus conferred because of special and personal considerations, so that the principal might obtain the benefit of the combined experience, discretion, and ability of such persons."[135] Further, the court held that the powers held by the appointed agents "must be jointly exercised by all of them, and may not be exercised by less than all of them."[136]

Unlike the MPA, the DPA cannot be revoked after the principal is deemed incapacitated.[137] However, because of the "significant grant of power" the DPA gives to the agent, the DPA is revocable any time prior to incapacitation of the principal.[138] Also, in order to make sure that the agent is not abusing his power over the principal's finances, the agent "has a duty to inform and to account for actions taken pursuant to the power of attorney."[139] This duty requires the agent to maintain records of his actions and to timely report his actions to the principal.[140] Finally, just because the DPA gives the agent authority to make decisions on the principal's behalf when the principal is competent (unless the DPA is springing), it does not give the agent the authority to override decisions made by the principal if the principal is still competent to make decisions.[141]

Because a power of attorney creates an "agency relationship" similar to the relationship created in a contract, the legal capacity to create a power of attorney "has traditionally been based on the capacity to contract."[142] The laws regarding the mental capacity to contract in Texas have remained consistent all the way back to the case of *Mandell & Wright v. Thomas*.[143] Texas courts have continually defined mental capacity as the ability of a person to "appreciate the effect of what she [is] doing and underst[and] the nature and consequences of her acts and the business she [is] transacting."[144]

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134. *Id.* at 912.

135. *Id.*

136. *Id.*

137. LAWRENCE A. FROLICK & ALISON M. BARNES, ELDER LAW: CASES AND MATERIALS 474 (LexisNexis Matthew Bender) (4th ed. 2007).

138. Susan L. Finnell & Karl T. Bryant, *Life's Uncertain, So Be Prepared Wills, Estate Plans Help Create Stability in an Unstable World*, 17 TEX. LAW. 27, 27 (2001).

139. TEX. PROB. CODE ANN. § 489B(a) (Vernon Supp. 2009).

140. *Id.*

141. ALZHEIMER'S ASS'N, *supra* note 14, at 8.

142. Whitehead & Phillips, *supra* note 113, at 10.

143. *See generally* Mandell & Wright v. Thomas, 441 S.W.2d 841 (Tex. 1969) (explaining mental capacity to contract).

144. Estate of Gomez, No. 04-05-00300-CV, 2005 Tex. App. LEXIS 9740, at *27 (Tex. App.—San Antonio 2005, no pet.) (mem. op., not designated for publication) (quoting *Mandell & Wright*, 441 S.W.2d at 845).

Further, Texas courts have held that mental capacity—or incapacity—"may be shown by circumstantial evidence."[145] Whether or not the person had the capacity to sign the document is determined by the mental capacity the person had at the time the document was executed.[146] However, "evidence of her mental capacity prior and subsequent to . . . is admissible."[147]

While there is no Texas case law that definitively states that the requisite mental capacity for a DPA is the same capacity required to contract, courts in other jurisdictions have issued opinions supporting this proposition.[148] In *In re Thames*, Thames, the mother, executed a DPA appointing her daughter Verdery as her agent.[149] Thames's husband later filed for *guardianship* over her.[150] In the case, Verdery sought to set aside documents that Thames had signed after Thames's husband was appointed as her guardian.[151] Verdery wanted the documents set aside on the grounds that Thames was not competent at the time she signed the documents.[152]

On appeal, the court had to decide what standard of review should apply "in an action to set aside a power of attorney and a revocation of a power of attorney for lack of mental capacity."[153] In order to determine the standard of review, the court first had to determine whether the action to set aside a DPA more closely resembled an action to set aside either a contract/deed or a will contest.[154] In discussing how a DPA creates an agency relationship, the court held that the cause of action was more in line with an action to set aside a contract or deed because contractual capacity was needed to execute and revoke the DPA.[155]

The court then looked at whether or not Thames had contractual capacity at the time the documents were executed.[156] Verdery claimed that her mother lacked the requisite capacity, relying on the fact that the court had appointed Thames's husband as her guardian prior to the execution of the documents.[157] However, the court found that the appointment of guardian was only in relation to Thames's physical condition and, because there had not been an appointment of conservator (guardian in Texas), her mental capacity had not been

145. *In re* Estate of Robinson, 140 S.W.3d 782, 793 (Tex. App.—Corpus Christi 2005, pet. dism'd) (citing Bach v. Hudson, 596 S.W.2d 673, 676 (Tex. App.—Corpus Christi 1980, no writ)).

146. In the Guardianship of Valdez, No. 04-08-00886-CV, 2009 Tex. App. Lexis 5404, at *6–7 (Tex. App.—San Antonio July 15, 2009, pet. denied) (mem. op. not designated for publication) (citing Decker v. Decker, 192 S.W.3d 648, 652 (Tex. App.—Fort Worth 2006, no pet)).

147. *Valdez*, 2009 Tex. App. LEXIS 5404 at *7.

148. *See In re* Thames, 544 S.E.2d 854, 856–57 (2001); *see also* Waller v. Evans, No. M2008-00312-COA-R3-CV, 2009 Tenn. App. LEXIS 301, *7 (Tenn. Ct. App. Mar. 17, 2009).

149. *Thames*, 544 S.E.2d at 855.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 856.

154. *Id.* at 856–57.

155. *Id.* at 857.

156. *Id.* at 857–58.

157. *Id.* at 858.

adjudicated.[158] Therefore, the evidence of guardianship appointment was not probative of Thames's mental capacity to contract.[159]

The Court of Appeals of Tennessee has also found that contractual capacity is the requisite mental capacity for DPAs.[160] In *Waller v. Evans*, the validity of a DPA was being contested on the grounds that the decedent had not possessed the requisite mental capacity at the time of its execution.[161] The court stated, "The mental capacity required to execute a power of attorney equates to the mental capacity required to enter into a contract."[162] Further, the court said that "[a]ll adults are presumed to be competent enough to enter into contracts . . . [i]t is not enough to prove that a person . . . had senile dementia. To prove mental incapacity, the person with the burden of proof must establish, in light of all surrounding facts and circumstances . . . . " that the impairment made the party incompetent to contract.[163] Therefore, the court implies that dementia, by itself, is not probative of a lack of contractual capacity.

These are just examples of the direction a few jurisdictions have taken. Other jurisdictions have also implemented the contractual capacity standard.[164] While contractual capacity has traditionally been the standard for creating powers of attorney, some other jurisdictions only require testamentary capacity.[165] Texas follows the contractual capacity standards.[166]

Of all the documents that a principal executes in estate planning, the Durable Power of Attorney is the most dangerous for the named agent to abuse. The probate courts encounter the abuse in guardianship referrals and applications. Usually, it is a family member who is named, and the temptation to benefit by deeding assets into the agent's name or spending funds on the agent's debts is often too great. It is paramount that the principal carefully consider who is to be named as their agent. Once the assets are siphoned away, it is very difficult to get them back. The loss of assets affects the lifestyle that the principal will enjoy in their remaining years, when they usually need their assets the most. If there is no one that the principal can rely on, a corporate trustee may be advisable.

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158. *Id.*

159. *Id.*

160. Waller v. Evans, No. M2008-00312-COA-R3-CV, 2009 Tenn. Ct. App. Lexis 301, at *3 (Tenn. Ct. App. Mar. 17, 2009).

161. *Id.* at *7.

162. *Id.* (quoting Estate of Dooley v. Hickman, No. E2005-02322-COA-R3-CV, 2006 Tenn. Ct. App. LEXIS 562, at *6 (Tenn. Ct. App. Aug. 29, 2006)).

163. *Id.* at *8 (quoting Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291, 297 (Tenn. Ct. App. 2001)).

164. *See Thames*, 544 S.E. 2d at 857 (stating that Minnesota and Ohio are other jurisdictions that have followed this standard).

165. Whitehead & Phillips, *supra* note 113, at 10.

166. *See* Logan v. McDaniel, 21 S.W.3d 683, 689 (Tex. App.—Austin 2000, pet. denied).

B. Revocable Trusts

A Living Trust, like the DPA, is another option for managing one's assets when planning for incapacity.[167] To create a Living Trust, the grantor, who is also the trustee, places their assets into a trust.[168] The grantor may make distributions from the trust to themselves to live on throughout their lifetime.[169] This type of trust benefits the person with dementia because it allows the person to appoint a "successor trustee" to handle their finances upon incapacitation.[170]

The terms of the trust should include the definition of incapacity. The advantage of having a Living Will over a DPA is that if all the grantor's assets are placed into the trust at their death, there will be no need to probate the grantor's will.[171] However, this requires that all of the grantor's assets be placed into the trust.[172] In order to make sure that all the grantor's assets are put into the trust upon their death, the Grantor can create a "'pour over' [w]ill . . . in conjunction with a Revocable Trust."[173]

Texas law has upheld the validity of a revocable trust.[174] While there is no recent case law, the ruling set forth by the Texas Supreme Court in *Westerfield v. Huckaby* still remains good law.[175] In *Westerfield*, the settler created a trust whereby "[s]he would retain control during her competency, and, when she was no longer capable of tending to her property," control would shift to a successor who would then be in charge of the property.[176] The validity of the trust was challenged on the grounds that it was "illusory and testamentary in character and imposed no enforceable fiduciary duties upon anyone."[177] However, the court found that there were often "[g]ood reasons" for a person to create a revocable trust over a will.[178] The court held that "[i]f an owner of property can find a means of disposing of it inter vivos that will render a will unnecessary for the accomplishment of his practical purposes, he has a right to employ it."[179]

Because "the revocable trust is used as a will substitute," it would be logical to say that the level of capacity required to revoke a will (testamentary capacity) is similar to the capacity required to revoke a trust.[180] However, it is

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167. Scroggins & Gyeszly, *supra* note 16, at 16.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 17.
172. *Id.*
173. *Id.* at 16–17.
174. *See* Westerfield v. Huckaby, 474 S.W.2d 189, 193–94 (Tex. 1971).
175. *Id.* at 193.
176. *Id.*
177. *Id.* at 191.
178. *Id.* at 193.
179. *Id.* (quoting Nat'l Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 122 (1944)).
180. Whitehead & Phillips, *supra* note 113, at 7–8.

important to note that if the person gives a specific method of revocation, this method must be complied with in order for the revocation to be valid.[181]

The capacity requirement to create a trust is set forth in section 112.007 of the Texas Property Code, which states that "[a] person has the same capacity to create a trust by declaration, inter vivos or testamentary transfer, or appointment that the person has to transfer, will, or appoint free of trust."[182] While this definition is somewhat vague, all states generally agree that capacity to create a trust requires the creator to "understand and appreciate the nature and consequences of the trust document."[183]

There appears to be some discrepancies about what is the requisite capacity for creating a trust.[184] The Uniform Trust Code states that testamentary capacity is needed to create a trust.[185] However, there is one Texas case that implies that contractual capacity is needed to create a trust.[186] In *Dildine v. Bonham*, the appellees were challenging various documents that their grandmother had executed, including trust amendments, on the ground that their grandmother lacked capacity to execute the documents.[187] The court distinguished amongst the capacities required for the will, trust amendments, and deed.[188] The court stated that the parties challenging the trust amendments and deed had to prove that their grandmother lacked contractual capacity at the time the documents were executed.[189] The court admitted testimony of the grandmother's physician into evidence.[190] The physician concluded that the grandmother had neither testamentary nor contractual capacity at the time the documents were executed because a stroke had caused her to have a "decrease in mental functioning and cognitive reasoning abilities."[191] The appellate court affirmed the trial court's determination that the grandmother lacked contractual capacity to execute the trust amendments.[192]

Other jurisdictions have also upheld this standard of contractual capacity.[193] In *Whittemore v. Neff*, the Superior Court of Connecticut distinguished the capacity required to create a will from the capacity required to create a trust.[194] The court stated that in order for the testator to create a valid

181. Gerry W. Beyer, *Annual Survey of Texas Law: Article: Wills and Trusts*, 58 SMU L. REV. 1205, 1222 (2005) (referring to McClure v. JP Morgan Chase Bank, 147 S.W.3d 648 (Tex. App.—Fort Worth 2004, pet. denied)).

182. TEX. PROP. CODE ANN. § 112.007 (Vernon 2007).

183. Whitehead & Phillips, *supra* note 113, at 7.

184. *Compare* UNIF. TRUST CODE § 601, 7C U.L.A. 545 (2006), *with* Dildine v. Bonham, No. 03-07-00631-CV, 2009 Tex. App. LEXIS 1752 (Tex. App.—Mar. 12, 2009, pet. denied).

185. UNIF. TRUST CODE § 601.

186. *See Dildine*, 2009 Tex. App. Lexis 1752, at *1.

187. *Id.*

188. *Id.* at *5.

189. *Id.* at *8.

190. *Id.* at *10.

191. *Id.* at *11.

192. *Id.* at *20.

193. *See* Whittemore v. Neff, 064348, 2001 Conn. Super. Ct. LEXIS 1631, at *17 (2001).

194. *Id.* at *16.

will, the testator must have been of sound mind and able to "understand the business upon which [he is] engaged."[195] In order to create a valid trust, however, the settlor must not merely be of sound mind, but be able to "reasonably understand[] the nature, extent, and effect or consequence of that trust."[196] However, the court implied that the requisite capacity for these documents may shift depending on the complexity of the documents, meaning that a complex will "would require . . . a higher degree of mental capacity and understanding."[197]

A trust is considered a complex legal document due to the complexity of trust instruments, which usually include the following: the powers of the trustee, the limitations of the trustee, the time the successor trustee commences, the distribution of the funds and assets, and other legal issues.[198] Due to the complex nature of a trust, the grantor's required level of capacity should be contractual capacity because it includes many terms that are beyond testamentary capacity.

V. OTHER ESTATE PLANNING DOCUMENTS

The documents mentioned above may be used in place of a guardianship.[199] The following two documents, however, do not take the place of a guardianship but still allow the person to have some control over their future well-being.

A. Declaration of Appointment of Guardian

Section 679 of the Texas Probate Code allows a person to designate an individual to be appointed as their guardian should the person become incapacitated.[200] More importantly, if the declarant feels strongly against a certain individual being appointed as their guardian, they can "disqualify [the] named persons from serving as their guardian . . . and the persons named may not be appointed guardian under any circumstances."[201] As long as the person named is qualified to serve as the guardian, the court "shall appoint the person as guardian."[202] If the person is unable or unwilling to serve, the court will appoint any alternatively qualified named persons, and if none, the court will appoint an individual that is qualified to serve under the provisions of section 681 and 690 of the Texas Probate Code.[203] Finally, if a spouse is appointed by

195. *Id.*
196. *Id.*
197. *Id.* at *17.
198. *See* Hunter v. Klimowicz, 867 N.E. 2d 626, 627–28 (Ind. Ct. App. 2007).
199. *See* discussion *supra* Part III.
200. TEX. PROB. CODE ANN. § 679 (Vernon Supp. 2009).
201. *Id.* § 679(b).
202. *Id.* § 679(f).
203. *Id.* §§ 681 & 690.

the declarant to serve as guardian, subsequent divorce will void the provision.[204]

The Declaration of Appointment of Guardian (DAG) can either be handwritten by the declarant or written by someone else if the declarant gives instructions and is present when it is written.[205] If the document is not handwritten by the declarant, the document must be "attested to in the presence of the declarant by at least two credible witnesses 14 years of age or older who are not named as guardian or alternate guardian in the declaration."[206] However, as of September 1, 2009, "a new form may be used which . . . combines the declaration and self-proving affidavit so that the principal and two witnesses may sign just once."[207] With this new method, the declarant and witnesses are no longer required to sign both the declaration and affidavit—although the old method is still accepted.[208] The DAG can be made self-proven in the same manner a will is self-proven.[209] Further, a Declaration of Appointment may be effectively revoked in the same manner a will is revoked.[210]

Again, there is really no case law to provide an explanation of the requisite capacity needed to execute a DAG. However, section 679(i) of the Texas Probate Code requires the witnesses to attest that the declarant "appeared to them . . . ***to be of sound mind***," in the self-proving affidavit.[211] This "sound mind" requirement is the same language used for the capacity to execute a will.[212] "Texas courts have defined 'sound mind' to mean 'testamentary capacity.'"[213] Therefore, one can infer that the requisite capacity needed to execute a DAG is testamentary capacity. Testamentary capacity will be discussed in more detail below.

The courts give great deference to the declaration—assuming that the person had capacity when executing it.[214] The declaration is important in cases when there are two relatives on the same familial level who would be equally qualified to serve, but in the declarant's experience with the parties, one might be considered "the good child"—who will truly take good care of the ward—versus "the bad child," who has constantly been an emotional and financial

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204. *Id.* § 679(h).

205. *Id.* § 679(a), (c).

206. *Id.* § 679(a)(2).

207. Karisch, *supra* note 41, at 19 (discussing H.B. 3080, which amends TEX. PROB. CODE ANN. §§ 677A, 669 (Vernon Supp. 2009)).

208. *Id.*

209. TEX. PROB. CODE § 679A (Vernon 2003 & Supp. 2009).

210. Laura M. Valdez, *A Captain for the Ship: Guardianship 101*, 70 TEX. B. J. 252, 254 (2007).

211. Whitehead & Phillips, *supra* note 113, at 10 (citing TEX. PROB. CODE ANN. § 679(i) (Vernon 2003 & Supp. 2009)).

212. Dickson v. Swain, No. 14-05-00062-CV, 2006 Tex. App. LEXIS 8369, at *4–5 (Tex. App.—Houston [14th Dist.] Sept. 26, 2006, no pet.).

213. *Id.* (citing Chambers v. Chambers, 542 S.W.2d 901, 906 (Tex. Civ. App.—Dallas 1976, no writ)).

214. *See* Overman v. Baker, 26 S.W.3d 506, 508 (Tex. App.—Tyler 2000, no pet.).

drain on the parent. If this is the scenario, naming whom the declarant wants to serve and whom he disqualifies from serving is of paramount importance.

B. Wills and Testamentary Capacity

A will is an estate planning document that everyone, "in all phases of life," should take the time to create.[215] As a brief overview, a will should be in writing, signed by the testator, and attested to by two disinterested witnesses who are above the age of fourteen.[216] In order for the will to be self-proving, affidavits of the testator and of the witnesses must be made before a notary.[217] Further, a will shall not be revoked "except by a subsequent will, codicil, or declaration in writing, executed with like formalities, or by the testator destroying or canceling the same, or causing it to be done in his presence."[218] If a person dies without a will, Texas's intestacy laws will determine how the decedent's estate will be distributed.[219]

For an instrument to be a deemed a will, it must have been executed with testamentary intent.[220] The document "must contain an explicit statement declaring that the writings are wills or codicils or that the property division will take place only after the decedent's death."[221] Further, the document must be more than a mere disposal of property.[222] Finally, as will be discussed later, the testator must have had testamentary capacity at the time the will was executed for it to be valid.[223]

Texas law has consistently held that a person must have been of "sound mind" on the day that they executed their will.[224] "Sound mind" has been determined to mean "testamentary capacity."[225] Texas courts have defined testamentary capacity as "sufficient mental ability, at the time of the execution of the will, to understand the business in which the testatrix is engaged, the effect of her act in making the will, and the general nature and extent of her property."[226] More specifically, this means that the testator must be able to

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215. Scroggins & Gyeszly, *supra* note 16, at 17.

216. TEX. PROB. CODE ANN. § 59(a) (Vernon Supp. 2009).

217. *Id.*

218. *Id.* § 63.

219. TEX. PROP. CODE ANN. § 71.001 (Vernon 2007).

220. In the Estate of Allen, No. 12-09-00146-CV, 2009 Tex. App. LEXIS 9510, at *8 (Tex. App.—Tyler Dec. 16, 2009 reh'g denied) (citing Hinson v. Hinson, 154 Tex. 561, 564, (Tex. 1955)).

221. *Id.* at *9 (citing *In re* Estate of Schiwetz, 102 S.W.3d 355, 364 (Tex. App. —Corpus Christi 2003, pet. denied)).

222. *Id.*

223. Dickson v. Swain, No. 14-05-00062-CV, 2006 Tex. App. LEXIS 8369, at *4–5 (Tex. App.—Houston [14th Dist.] Sept. 6, 2006, no pet.).

224. Bracewell v. Bracewell, 20 S.W.3d 14, 19 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing TEX. PROB. CODE ANN. § 88(b)(1) (Vernon 1980)).

225. *Id.* (citing Chambers v. Chambers, 542 S.W.2d 901, 906 (Tex. Civ. App.—Dallas 1976, no writ)).

226. *Id.* at 19 (quoting Hoffman v. Texas Commerce Bank Nat'l Ass'n, 846 S.W.2d 336, 340 (Tex. App.—Houston [14th Dist.] 1992, pet. denied)).

identify their heirs and the property that they hold.[227] Beyond that however, the testator must be also able to "assimilate the elements of the business to be transacted, to hold those elements long enough to perceive their obvious relation to each other, and to form a reasonable judgment as to them."[228]

Further, Texas courts have consistently held that testamentary capacity is determined by looking at evidence limited to the actual day that the parties executed the will.[229] Therefore, if a person did not have capacity before or after the execution, a will can still be valid as long as it was made during a "lucid interval."[230] In *In re Estate of Trawick*, the court said that only when there is no testimony of the testator's capacity on the day the will was executed, can the testator's capacity at the execution of the will "be determined from lay testimony based on the witnesses' observations of the testator's conduct either prior or subsequent to the execution."[231] However, the court also stated that this evidence only has "probative force" when there is proof that the testator's capacity has been affected by a continual condition and there is a probability that this condition influenced the testator's capacity on the day the will was executed.[232] *Trawick* provides a good example of a testator having capacity during a "lucid interval."

In *Trawick*, the testator's grandchildren contested the will.[233] The will had appointed the testator's niece as both independent executor and sole beneficiary.[234] The grandchildren claimed that their grandmother did not have testamentary capacity on the day she executed the will.[235] However, the jury disagreed, finding that the testator did have testamentary capacity.[236]

The grandchildren appealed on the grounds that the evidence was insufficient to support the finding that their grandmother had testamentary capacity.[237] They provided several witnesses who testified that the grandmother's competency had declined noticeably.[238] However, none of the witnesses were able to testify as to her competency on the exact day of the will's execution.[239] Further, some of the witnesses testified that the grandmother had "'good days' and 'bad days.'"[240] Additionally, some of the witnesses testified that the grandmother "had the mental capacity to sign

227. *Id.*
228. *Id.* (quoting Jones v. LaFarque, 758 S.W.2d 320, 325 (Tex. App.—Houston [14th Dist.] 1988, writ denied)).
229. Whitehead, *supra* note 113, at 6.
230. *Id.* (citing *In re* Estate of Trawick, 170 S.W.3d 871 (Tex. App.—Texarkana 2005, no pet.)).
231. *In re* Estate of Trawick, 170 S.W.3d at 877 (citing Lee v. Lee, 424 S.W.2d 609, 611 (Tex. 1968)).
232. *Id.*
233. *See id.* at 873.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 874.
238. *Id.* at 877–80.
239. *Id.*
240. *Id.* at 880.

another will and a power of attorney only a few months before she signed the will at issue."[241] The court upheld the jury's determination, stating that "[w]hile the contestant's evidence did show that some of Trawick's conduct . . . was senile . . . there was no evidence" that she was incompetent on the day the will was made.[242]

In *Rumfolo v. Angelo*, the First District Court of Appeals in Houston upheld a holographic will despite that fact that the testator had recently been released from the hospital where he was being treated for psychiatric problems.[243] The testator had been released from the hospital on January 13, 1977, and on February 15, 1977, he executed a power of attorney, which appointed his wife as his agent.[244] While there, he also made a handwritten will on the back of an envelope, leaving all his belongings to his wife.[245] This was witnessed and signed by two people, one who later testified that Walter was "thinking clearly" at this time and that she saw Walter create his will.[246]

After Walter's death, when his wife tried to have the will probated as a muniment of title, their children contested the will claiming that Walter had lacked testamentary capacity when he executed the document.[247] Following *Prather v. McClelland*, the court stated that:

> Testamentary capacity means possession of sufficient mental ability at the time of execution of the will (1) to understand the business in which the testator is engaged, the effect of making the will, and the general nature and extent of his property, (2) to know the testator's next of kin and the natural objects of his bounty, and (3) to have sufficient memory to assimilate the elements of the business to be transacted, to hold those elements long enough to perceive their obvious relation to each other, and to form a reasonable judgment as to them.[248]

Relying on the testimony of a subscribing witness that Walter "was thinking clearly" at the time he executed the will, the appeals court held the trial court's finding was not "against the great weight and preponderance of the evidence."[249] The court upheld the trial court's decision despite the fact that there was contradictory evidence as to Walter's capacity, and the court upheld the trial court's decision despite the fact that there was evidence that Walter

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241. *Id.*
242. *Id.* (quoting Lee v. Lee, 424 S.W.2d 609, 611 (Tex. 1968)).
243. Rumfolo v. Angelo, No. 01-99-01098-CV, 2000 Tex. App. LEXIS 8576, at *4 (Tex. App.—Houston [1st Dist.] Dec. 28, 2000, no pet.) (not designated for publication).
244. *Id.* at *2.
245. *Id.*
246. *Id.*
247. *Id.* at *2–3.
248. *Id.* at *3–4 (citing Prather v. McClelland, 13 S.W. 543, 546 (Tex. 1890)).
249. *Id.* at *4–5.

was taking a low dosage of medication at the time.[250] In conclusion, both *Trawick* and *Rumfolo* show that the barrier to proving testamentary capacity is not that high. Testamentary capacity is a much lower level of capacity than contractual capacity, which should be apparent for the drafting of trusts or statutory durable powers of attorney.

VI. THE ETHICAL IMPLICATIONS OF COMPLETING LEGAL DOCUMENTATION WITH AND FOR PERSONS WITH DEMENTIA

A. Legal Representation

"Legal representation of a client with dementia raises a plethora of ethical issues."[251] If a client appears to have dementia, the attorney may be placed in several gray-area situations.[252] Unfortunately, there is often no clear answer, and the Model Rules of Professional Conduct are seemingly vague in this area.[253]

First, the attorney may have to balance their "duty of zealous representation" against the desire to protect the client from making an unsound decision caused by the client's dementia.[254] While the attorney may want to protect the client from making a potentially dangerous decision, the attorney-client privilege may present an even more serious dilemma.[255] Even when the client's cognitive ability is impaired, an attorney is required under The Model Rules of Professional Conduct (Model Rules) to maintain a normal attorney-client relationship to a reasonable extent.[256] Therefore, while the attorney may want to notify their client's family of their concerns, the attorney must also take into consideration attorney-client privilege.[257] Only when there is evidence of elder abuse either physically or financially or self-neglect, is the attorney-client privilege waived.[258]

The Model Rules may provide some relief for the attorney in this situation. Under the Model Rules, the attorney is allowed to take some protective action, such as seeking an appointment of a guardian, but only if "the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[259] However, determining incapacity can be tricky, especially for a lawyer who is "not a licensed mental health professional."[260] Further, a

250. *Id.* at *4.

251. James D. Gallagher & Cara M. Kearney, *Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go*, 16 GEO. J. LEGAL ETHICS 597, 597 (2003).

252. *Id.*

253. *Id.* at 598.

254. *Id.* at 597.

255. *Id.* at 598.

256. Kirtland, *supra* note 116, at 193 (citing the MODEL RULES OF PROF'L CONDUCT, R. 1.14).

257. Gallagher and Kearney, *supra* note 251, at 598.

258. MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

259. Kirtland, *supra* note 116, at 195.

260. *Id.* at 194.

determination of capacity may be clouded by the fact that the client may appear to have the requisite capacity on a "good day," and nevertheless lack capacity on the next.[261]

Another ethical issue that arises when representing clients with dementia occurs in situations where the client is brought in by a third party, such as a family member.[262] The attorney can then be faced with the dilemma of determining which person they are truly representing.[263] Ethical implications especially abound in situations where the family member who brought the client in stands to gain something from the document the client is executing.[264] In this situation, the attorney must be careful to guard against intentional, and even unintentional, undue influence by the family member.[265] While this discussion was particularly aimed at attorneys, these same ethical issues are applicable to other professionals who have similar, confidential relationships with their clients. In cases such as this, meeting alone with clients for an extended period of time in order to gain their confidence is a necessary tactic.

VII. CONCLUSION

When drafting estate planning documents, the capacity level for each document is not the same. A person may have the capacity to execute a will but not the capacity to sign a statutory durable power of attorney. A person may have the capacity to execute a medical power of attorney but not a living trust. Professionals who are assisting persons need to assure themselves of that individual's level of capacity prior to recommending the execution of such documents.

People living with cognitive limitations have many options for filling the voids in their lives. For example, professionals need to identify the strengths and weaknesses of their client. The professionals should strive to implement the lesser restrictive alternatives to the extent necessary. However, the professionals should not lose sight of balancing the lesser restrictive alternatives or independence against the client's health and safety.

261. *Id.* at 192.
262. *Id.* at 193.
263. Gallagher & Kearney, *supra* note 251, at 598.
264. *See* Kirtland, *supra* note 116, at 193.
265. *Id.* at 194.